Supreme Court, U. S.
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In The

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75- 75-1511

LARRY J. WILLIAMS,
Petitioner,

vs.

SOUTHERN UNION GAS COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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SOUTHERN UNION GAS COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Larry J. Williams, the Petitioner, prays that a writ of certiorari issue to review judgment of the United States Court of Appeals for the Tenth Circuit entered herein on January 21, 1976.

OPINIONS BELOW

The opinion of the Court of Appeals (App. B, page 3a) is as yet unreported except unofficially at 11 EPD ¶ 10,621. The opinion of the District Court (App. C, page 17a) is unreported.

JURISDICTION

The judgment of the Court of Appeals was entered January 21, 1976 (App. A, page 1a). The jurisdiction of this court is invoked pursuant to 28 U.S.C. Section 1254 (1).

QUESTIONS PRESENTED

Title VII of the 1964 Civil Rights Act, as amended, and the EEOC's "Religious Accommodation" guideline promulgated thereunder, require an employer to justify the refusal to accommodate the religious observance and practice of an employee by demonstrating that reasonable accommodation of the employee's requirements would impose undue hardship on the conduct of the employer's business. The questions presented in this case are:

(1) Whether the failure of an employee to work on one occasion due to his religious convictions can ever constitute a valid "undue hardship," justifying the employee's discharge, even assuming such failure caused a temporary hardship, when the employer has failed to introduce any evidence whatsoever of a probability that a hardship would ever occur again.

(2) Whether the appellate court correctly decided that the matters of "reasonable accommodation" and "undue hardship" are questions of fact, which may be reversed on appeal only upon a showing of being "clearly erroneous," or whether they are questions of law, ultimate fact or legal inferences from the facts, which may be reversed free of the clearly erroneous doctrine.

STATUTE AND REGULATIONS INVOLVED

Section 701(j) of the Civil Rights Act of 1964, as amended, provides:

> "The term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business." 42 U.S.C. Section 2000(e)(j).

Section 703(a) of the Civil Rights Act of 1964, as amended, provides in pertinent part as follows:

> "It shall be an unlawful employment practice for an employer . . . to . . . discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. Section 2000(e-2)(a)(1).

Part 1605 of the Equal Employment Opportunity Commission's Religious Discrimination Guidelines provides in pertinent part as follows:

> "(b) The Commission believes that the duty not to discriminate on religious grounds, required by Section 703(a)(1) of the Civil Rights Act of 1964, includes an obligation on the part of the employer to make reasonable accommodations to the religious needs of employees and prospective employees where such accommodations can be made without undue hardship on the conduct of the employer's business. Such undue hardship, for example, may exist where the employee's needed

work cannot be performed by another employee of substantially similar qualifications during the period of absence of the Sabbath observer.

"(c) Because of the particularly sensitive nature of discharging or refusing to hire an employee or applicant on account of his religious beliefs, the employer has the burden of proving that an undue hardship renders the required accommodations to the religious needs of the employee unreasonable." 29 CFR Section 1605.1(b) and (c).

STATEMENT OF THE CASE

Introduction

The court already has before it in the case of *Parker Seal Co.* v. *Paul Cummins*, No. 75-478, October Term, 1975, a case involving similar issues as are raised in this case. Those are the questions of what constitutes "reasonable accommodation" to the religious beliefs and practices of an employee and what constitutes "undue hardship" on the business of the employer.

In this case, Al Dean, a supervisor for the employer, Southern Union Gas Company, fired Larry Williams, the petitioner, on Friday, October 2, 1970, when said employee refused the supervisor's order to put a new gas pipeline into service on Saturday morning, the day of the employee's Sabbath observance. The supervisor delayed leaving on a scheduled elk hunting trip until noon Saturday in order to put the pipeline in service himself. He testified that he would otherwise have left early Saturday morning. There was no showing that the problem would ever occur again.

The district court made a finding of fact and conclusion of law that the employer reasonably accommo-

dated the religious beliefs of the employee and that to have accommodated said employee's refusal to work on Saturday, October 3, 1970, would have placed an undue hardship on the conduct of the employer's business. The court of appeals affirmed the holding of the district court and held that the foregoing were questions of fact which could not be reversed unless the findings of the trial court were clearly erroneous.

Background Facts

Williams began work for the Southern Union Gas Company on July 20, 1962. In December of 1969, Williams became a member of the Worldwide Church of God, a church which holds as one of it tenets the keeping of the seventh-day Sabbath from Friday sundown to Saturday sundown.

Williams' supervisor, Al Dean, knew of his religious beliefs regarding observance of the seventh-day Sabbath as early as October or November, 1969. However, at the time there was no job problem because Plaintiff had for at least two years been on a regular work schedule providing for him to work Sundays through Thursdays and to be off Fridays and Saturdays. It was admitted by Williams' supervisor that Williams had never been required to work once on Saturday for 16 months prior to October 3, 1970. The supervisor stated that he did not worry about the fact that Williams could not work on Saturday because "he thought he was bluffing . . ."

During the last week of September and the first week of October, 1970, Southern Union Gas Company was installing an additional gas line in the "Doggy Canyon" area in New Mexico. Supervisor, Al Dean, knew as early as Wednesday of that week that the

construction on the new Doggy Canyon line might not be completed before Saturday, and he informed Williams that he wanted him to be available to put the line into service on Saturday if it was not completed before that time.

On Friday evening, October 2, 1972, work on the Doggy Canyon line had not been completed by quitting time. Williams contacted Dean and informed him that the line had not been completed and that he would not be there the next morning to pressure up the line because of his religious beliefs. Dean stated that it was imperative that Williams or himself be there to do the work in the morning. Williams offered to do it on Saturday night, Sunday morning, or any other time, but Dean insisted it had to be done on Saturday morning. When Williams refused to do the work at said specific time, Dean terminated him.

Williams had previously informed Supervisor Dean that he could work on Saturday in an extreme emergency. Dean admitted under oath that this was not an extreme emergency. In fact, Dean never informed Williams that any emergency existed at all.

On Saturday, October 3, 1970, Al Dean and two other employees pressured up the Doggy Canyon line and put it into service. The only "hardship" incurred by Southern Union Gas Company was that Dean had to delay leaving on his scheduled elk hunting trip until Saturday noon, whereas he had planned to leave early in the morning.

Southern Union Gas Company made no showing of any additional expense on the company, of other workmen being forced to accept less favorable working

conditions, of any loss of service to customers, nor of any decline in efficiency, because none of these conditions occurred.

On Monday, October 5, 1970, Dean met with Williams and informed him that, if he would reconsider his position regarding his religious beliefs, he would reinstate Williams immediately without loss of position, wages or benefits. Williams refused to accept reinstatement on the proffered basis.

The Proceedings Below

After being discharged, Williams filed a complaint of employment discrimination with the Equal Employment Opportunity Commission. The EEOC thereafter made an investigation and issued a finding of "reasonable cause" to believe that Williams had been discriminated against in his employment on the basis of his religious convictions. When attempted conciliation failed, Williams was issued a "Notice of Right to Sue." Thereafter, this action was begun by a complaint filed in the United States District Court at Albuquerque, New Mexico.

After trial, the district court made the following findings of fact:

> "8. The plaintiff's immediate supervisor had been scheduled for vacation commencing Saturday, October 3, 1970, for more than six months prior and had made arrangements to meet out-of-state residents in a remote location where they could not be reached by phone in order to begin an elk hunt.
>
> "9. When it became obvious to the plaintiff's supervisor that the pipeline project would not be

finished by sundown Friday, October 2, 1970, and that the project would have to be finished Saturday, October 3, 1970, he so notified the plaintiff who refused to work on Saturday, October 3, 1970.

"10. As a result of his refusal to work on Saturday, plaintiff was terminated."

Based on the foregoing, the district court made the following "findings of fact":

"13. That defendant at all material times reasonably accommodated the religious beliefs of the plaintiff.

"14. That to have accommodated the plaintiff's refusal to work on Saturday, October 3, 1970, would have placed an undue hardship on the defendant and the conduct of its business, and as a result, defendant was justified in discharging plaintiff because of his refusal to work.

"15. That defendant did not discriminate against the plaintiff on account of his religious beliefs."

The district court restated the foregoing "findings of fact" Nos. 13 through 15 as its conclusions of law:

"1. That at all material times hereto the defendant complied with the relevant provisions of the Civil Rights Act of 1964 as amended in that it reasonably accommodated the religious needs of the plaintiff, and that to have accommodated the plaintiff during the instance in question would have placed an undue hardship on the defendant and the conduct of its business operations.

"2. That defendant did not discriminate against the plaintiff on account of his religious beliefs in

violation of the Civil Rights Act of 1964 as amended."

There was no showing, nor was there any finding of the Court, of any probability of the same or similar occasions arising again where Petitioner's presence would be needed on his Sabbath.

On appeal, Petitioner raised the issue that the Respondent had not met their burden of demonstrating that they could not "reasonably accommodate" Williams' religious beliefs without resulting in "undue hardship" on the conduct of their business. Petitioner also raised the argument that this failure to work on this one and only occasion, with no showing that this was likely to be a continued problem, did not constitute an undue hardship on the employer.

The appellate court first held as follows:

"The key phrases are 'reasonably accommodate' and 'undue hardship.' In our view the issues before the trial court in the instant case were basically questions of fact, and not ones of law. In such event Williams on appeal is not entitled to a trial de novo, and the trial court's resolution of the matter cannot be overturned unless it be 'clearly erroneous' (Cases cited). The trial court's findings in the instant case are not clearly erroneous and are supported by the record. It is on this basis that we affirm."

The appellate court did not discuss the question of whether the showing of a delay of the supervisor's scheduled elk hunting trip for a few hours met the employer's burden of demonstrating an undue hardship. Neither did the court discuss the fact that this had been only a one-time occurrence or the lack of evidence of the probability of such an event occurring again.

The appellate court concluded as follows:

"In our view whether Southern Union in the instant case acted in a reasonable manner is a matter upon which reasonable minds might conceivably differ. Such fact, however, does not permit us to substitute our judgment for that of the trial court. It was the trial judge who heard the testimony and saw the various witnesses. He is the one who draws the inferences and finds the facts. In such circumstances we should not disturb his determination of the matter."

REASONS FOR GRANTING THE WRIT

I. **The decision below would impose a particularly onerous economic, financial, and occupational burden on employees whose sincere religious beliefs differed from that of their employers and thus resulted in a one-time failure to work.**

The foregoing is an important question of federal law which has not, but should be, settled by this court.

In the fall of 1970, Larry Williams had been working for eight years for the Southern Union Gas Company. He had progressed through several positions to that of production repairman.

At the time of Williams' termination, his employer was engaged in a particular construction project of a new gas line. There was no testimony whatsoever that there was any probability of there being future construction projects which would require Mr. Williams to work on Saturday. The fact that he had not worked in at least sixteen months, and that his regular work schedule was Sunday through Thursday, is evidence

that the particular occasion was the rare and unusual occasion, not the usual and common requirement of Petitioner's job.

The question for the court is, therefore, should an employer be permitted to terminate, with impunity, a long-time, faithful and valuable employee who has given years of his life serving that employer, simply because on a one-time occasion that employee could not perform a particular requirement for the employer due to the employee's sincere religious convictions.

Petitioner contends that such a one-time event does not rise to the dignity of an undue hardship on an employer's business.

The Fifth Circuit has on a number of occasions aptly described invidious discrimination in employment opportunity as:

> ". . . one of the most deplorable forms of discrimination known to our society for it deals not with just an individual's sharing in the 'outer benefits' of being an American citizen, but rather the ability to provide decently for one's family in a job or profession for which he qualifies or chooses." *Rowe* v. *General Motors Corp.*, 457 F.2d 348, 354 (5 Cir. 1972); *Culpepper* v. *Reynolds Metals Co.*, 421 F.2d 888, 891 (5 Cir. 1970); *Huff* v. *N.D.Cass Co. of Alabama*, 485 F.2d 710, 713 (5 Cir. 1973).

If this case is allowed to stand, it will result in the denial of one of the basic rights of American citizens. That is the *right to work* "in a job or profession for which he qualifies or chooses."

It will mean an employee who may have worked for years and years for an employer, and is nearing

retirement or pension, could be deprived of it all simply because on one occasion he could not perform some requirement of his employer because of sincerely held religious convictions. This is one of the very things the Civil Rights Act of 1964 was intended to prohibit.

II. The court should clarify for the guidance of the appellate courts below the scope of review of district court findings of fact and conclusions of law as to what constitutes "reasonable accommodation" and "undue hardship."

The limited scope of review granted by the appellate court below is contrary to this court's pronouncements on the subject.

In the case of *Baumgartner* v. *United States*, 322 U.S. 665, 671, 88 L.Ed. 1525, 1529 (1944) Justice Frankfurter, writing for the court, stated as follows:

"The conclusiveness of a 'finding of fact' depends on the nature of the materials on which the finding is based. The finding even of a so-called 'subsidiary fact' may be a more or less difficult process varying according to the simplicity or subtilty of the type of 'fact' in controversy. Finding so-called ultimate 'facts' more clearly implies the application of standards of law. And so the 'finding of fact' even if made by two courts may go beyond the determination that should not be set aside here. Though labeled 'finding of fact,' it may involve the very basis on which judgment of fallible evidence is to be made. Thus, the conclusion that may appropriately be drawn from the whole mass of evidence is not always the ascertainment of the kind of 'fact' that precludes consideration by this

court (case cited) particularly is this so where a decision here for review cannot escape broadly social judgments—judgments lying close to opinion regarding the whole nature of our government and the duties and immunities of citizenship. Deference properly due to the findings of a lower court does not preclude the review here of such judgments."

The question here presented is just such an important question—that involving the civil rights of a citizen not to be denied employment opportunity solely on the basis of his religious observance or practice.

The question of whether the employer could reasonably accommodate the Petitioner's religious observance and practice without "undue hardship" on its business was the very heart and core of the controversy before the courts below. It was, at the very least, the ultimate fact for consideration, as opposed to the subsidiary facts of what actually occurred. The proof of this is readily seen in the district court opinion (App. C, page 17a), in which the district court, by adding citations of law, transformed its last three "findings of fact" into "conclusions of law."

The courts below have vacillated as to whether these are issues of fact or question of law. The Sixth Circuit has applied the "clearly erroneous" doctrine. In the case of *Cummins* v. *Parker Seal*, which has already been accepted by this court for review, October Term, 1975, No. 75-478, the court overturned as "clearly erroneous" the district court finding that accommodation of Cummins' beliefs would have been an "undue hardship" on Parker Seal Company.

In the case of *Draper* v. *United States Pipe & Foundry Co.*, 527 F.2d 515 (1976) another divided panel

of the Sixth Circuit overturned as clearly erroneous a similar finding of a district court.

In the case of *Hardison* v. *Transworld Airlines, Inc.*, 527 F.2d 33 (8 Cir. 1975) the Eighth Circuit noted that one of the issues argued before them was whether the findings of the district court that the defendants had fulfilled their duties to attempt reasonable accommodation of Hardison's religious practices, short of undue hardship, were clearly erroneous. However, the court never discussed the question. Instead, the court cited the proposition that the burden of proving undue hardship was upon the employer and then stated: "We cannot say that its burden of proof has been met in this case." In so stating, the court reversed, seemingly without regard to the "clearly erroneous" doctrine.

Trial courts in the following cases have considered as matters of law, and have so indicated in their conclusions, the question of whether, under the facts of the particular case, an employer could "reasonably accommodate" the religious observance and practice of an employee without "undue hardship" on its business. *Dixon* v. *Omaha Public Power District*, 385 F.Supp. 1382 (D. Neb. 1974), *Johnson* v. *U.S. Postal Service*, 364 F. Supp. 37 (N.D. Fla. 1973), and *Jordan* v. *North Carolina National Bank*, 389 F.Supp. 172, 179 (W.D.N.C. 1975).

In all three of the foregoing cases, the courts included the subsidiary facts, upon which their conclusions of law were based, in their "findings of fact."

In other areas, the Tenth Circuit itself has stated the standard of review of trial court "findings" as follows:

> "The 'clearly erroneous' rule does not apply on questions of law or on mixed questions of fact and law. See cases cited in 9 Wright & Miller, Federal Practice and Procedure: Civil §2588, 2589; Wright, Law of Federal Courts, 2nd Ed. §96." *Stapos* v. *Jarvis*, 447 F.2d 369, 372 (10 Cir. 1973).

The Sixth Circuit on a number of occasions has held as follows:

> "Where a finding designated as a finding of fact is not in reality a finding of facts, but is a conclusion of law or a mixed finding of fact and conclusion of law, it is not binding on the appellate court. (cases cited). Where a finding is of an ultimate fact in the making of which is involved the application of legal principles, it is subject to review (case cited)." *Cordovan Associates, Inc.* v. *Dayton Rubber Company*, 290 F.2d 858, 860 (6 Cir. 1961).

In the recent case of *United States* v. *Weingarden*, 473 F.2d 454, 460 (1973) the Sixth Circuit cited the foregoing quote from *Cordovan Associates*, supra, and stated as follows:

> "In our opinion, the finding by the district court that the sole purpose of the issuance of the summons is for criminal prosecution, is not a finding of fact. It is either a mixed finding of fact and conclusion of law, or it is a finding of ultimate fact in the making of which is involved legal principles. It is subject to appellate review, and the clearly erroneous rule has no application."

The foregoing standard of review has been followed by the Ninth Circuit in *Official Creditors' Committee of Fox Markets, Inc.* v. *Ely*, 337 F.2d 461, 467; the

Seventh Circuit in *Chandler* v. *United States*, 226 F.2d 403, 405 (7 Cir. 1955) and *Fritz* v. *Jarecki*, 189 F.2d 445, 448 (7 Cir. 1951); the Fifth Circuit in *Industrial Instrument Corporation* v. *Foxborough Co.*, 307 F.2d 783, 786 (footnote 2, 5 Cir. 1962); the Third Circuit in *Schultz* v. *Wheaton Glass Co.*, 421 F.2d 259, 267 (3 Cir. 1970); and *Lehmann* v. *Acheson*, 206 F.2d 592, 594 (3 Cir. 1953); and the Second Circuit in *In re Hygrade Envelope Corp.*, 366 F.2d 584, 588 (2 Cir. 1966).

In view of the foregoing, the Tenth Circuit applied an erroneously restrictive standard of review to the question of whether Southern Union Gas Company had met its burden of demonstrating that "reasonable accommodation" could not be made to Petitioner's religious observance and practice without "undue hardship" on its business.

CONCLUSION

For the foregoing reasons, Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the court of appeals below upon plenary briefing and argument. Alternatively, Petitioner respectfully prays that this court summarily vacate the judgment below and remand for reconsideration in the light of this court's pronouncements in *Baumgartner*, supra.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT
NOVEMBER TERM—JANUARY 21, 1976

Before The Honorable William J. Holloway, Jr., The Honorable Robert H. McWilliams and The Honorable James E. Barrett, Circuit Judges

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Nos. 75-1104
75-1105
(D.C. No. 74-130)

LARRY J. WILLIAMS,
Plaintiff-Appellant,
Cross-Appellee,
vs.
SOUTHERN UNION GAS COMPANY,
Defendant-Appellee,
Cross-Appellant,
UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Amicus Curiae.
NEWSPAPER AGENCY CORPORATION,
Amicus Curiae in the
Cross-Appeal.

This cause came on to be heard on the record on appeal from the United States District Court for the

- - - - District of New Mexico, and was argued by counsel.

Upon consideration whereof, it is ordered that the judgment of that court is affirmed.

Howard K. Phillips, Clerk
By /s/ Robert L. Hoecker
Chief Deputy Clerk

APPENDIX B

(Filed January 21, 1976)

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 75-1104 and 75-1105

LARRY J. WILLIAMS,
Plaintiff-Appellant,
Cross-Appellee,
v.
SOUTHERN UNION GAS COMPANY,
Defendant-Appellee,
Cross-Appellant,
UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Amicus Curiae.
NEWSPAPER AGENCY CORPORATION,
Amicus Curiae in the
Cross Appeal.

Appeal from the United States District Court for the District of New Mexico (D. C. No. 74-130)

Robert J. Laughlin (Ralph K. Helge on the brief), for Plaintiff-Appellant and Cross-Appellee.

Owen M. Lopez (Jeffrey R. Brannen, Montgomery, Federici, Andrews, Hannahs & Buell on the brief), for Defendant-Appellee and Cross-Appellant.

Charles L. Reischel, Assistant General Counsel (Julia P. Cooper, Acting General Counsel, Joseph T. Eddins, Associate General Counsel, Beatrice Rosenberg, Assistant General Counsel, on the brief), for Equal Employment Opportunity Commission, Amicus Curiae.

James S. Lowrie and Edward J. McDonough of Jones, Waldo, Holbrook & McDonough on the brief for Newspaper Agency Corporation, Amicus Curiae.

Before HOLLOWAY, McWILLIAMS and BARRETT, Circuit Judges.

McWILLIAMS, Circuit Judge.

This is a Civil Rights case based on a claim of unlawful job discharge. From July 1962 until October 3, 1970, Larry Williams was employed by the Southern Union Gas Company, initially as a dehydrator repairman's helper and later as a production repairman. On October 3, 1970, a Saturday, Williams was fired by Southern Union when he refused to report for work. Williams was at that time a member of the Worldwide Church of God. One of the tenets of this church is that its members should not work on the Sabbath, and Sabbath for this church is from sundown Friday to sundown Saturday. The reason given by Williams for not reporting for work on Saturday, October 3, 1970, was that his religion forbade working on the Sabbath.

On March 26, 1971, Williams filed a complaint with the Equal Employment Opportunity Commission alleging that Southern Union in firing him had discriminated

against him because of his religion and in so doing had engaged in unlawful employment practices in violation of Title VII of the Civil Rights Act of 1964. On May 30, 1973, the Commission sent a letter to Williams advising him that compliance efforts had been unsuccessful and that he could bring a private action if he so desired. More specifically, this letter of May 30, 1973, advised Williams that if he decided to sue he should request a "Right-to-Sue" letter from the Commission and that he would have 90 days from the time the "Right-to-Sue" letter was received within which to bring an action against Southern Union. Williams did request such a letter, and on December 6, 1973, the "Right-to-Sue" letter was issued. Williams instituted the present action under 42 U.S.C. §2000(e), as amended, on March 6, 1974. On trial the trial court found for Southern Union and entered judgment dismissing the action "on the merits." Williams now appeals.

By separate appeal Southern Union seeks review of the trial court's ruling that it had subject matter jurisdiction. In this regard it is Southern Union's position that the suit was not timely brought. The background facts must be developed in some detail.

When Williams went to work for Southern Union in 1962 he was informed that it was a company policy that all employees should be available for work seven days a week, 24 hours per day. Southern Union felt this was necessary inasmuch as it was a public utility and as such was obligated to provide continuous and uninterrupted natural gas service to the general public. It was also Southern Union's policy, however, to schedule its employees for only five days of work each week, eight hours per day. Williams in 1962 did not belong to any church and hence was under no prohibition, religious or otherwise, from working any day in the week.

During the fall of 1969 Williams became a member of the Worldwide Church of God. He informed his supervisor of his conversion and advised him that he would no longer be able to work between Friday at sundown and Saturday at sundown. The supervisor, one Al Dean, explained that it would be difficult to promise that Williams would never be called on to work on a Saturday, but that he would do what he could. Coincidentally, or otherwise, at the time of his conversion Williams' regular work week was from Sunday through Thursday, with both Friday and Saturday off. It would appear that for obvious reasons most all employees desired to have Saturday off. At his supervisor's suggestion Williams checked back with his minister and was informed that he could work on Saturdays if there were an emergency, but that since this was a matter between Williams and his God, he (Williams), and not his employer, would have to make the decision as to whether a true emergency existed.

From the date of his conversion in the fall of 1969 until October 3, 1970, Williams was never asked to work on Saturday. During the fall of 1970 Williams was assigned to work on the Dogie Canyon project in northwest New Mexico, a rather isolated location. This was a new pipeline about 25 miles long that was to expand the capacity of the pipeline system which took natural gas from the production area of the San Juan Basin and supplied the Las Alamos-Santa Fe area with natural gas. This project was running somewhat behind schedule and Southern Union, at least, was of the view that the pipeline had to be completed, purged of air, and brought up to pressure by Saturday, October 3, 1970.

On Wednesday, September 30, 1970, Williams went to Dean, his supervisor, and told him that Thursday,

October 1, 1970, was a special religious holiday in his church and that he would have to have the day off. Dean agreed that Williams could take Thursday off, but explained that the pipeline would have to be pressured up by Saturday, and that if the work were not completed by Friday night Williams would have to work Saturday. Williams testified that he made no protest at this time about the possibility of Saturday work, as he thought the project might very possibly be completed by Friday, and any confrontation would thereby be avoided.

So, Williams took Thursday off. Unfortunately for Williams, the job was not completed on Friday and Friday evening Williams called Dean at the latter's home and told Dean that he would not report for work on Saturday morning, as he had been directed. Dean's response was that if Williams didn't show up he would be fired. Dean himself was scheduled to go on vacation starting Saturday, October 3, 1970. When Williams didn't show up for work on Saturday, October 3, 1970, Dean delayed the start of his vacation and completed the work himself. It was in this factual setting that Dean fired Williams.

We shall first consider whether the trial court had subject matter jurisdiction. In this general connection Southern Union contends that the present action is barred by two statutes of limitation contained in the Civil Rights Act.

The statute relied on by Southern Union in its jurisdictional argument is 42 U.S.C. § 2000e-5(f)(1) and reads in pertinent part as follows:

> If within 180 days from the filing of such a charge . . . the Commission has not filed a civil action

> under this section . . . or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission . . . shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved . . . .

It is Southern Union's position that the statute set forth above should be read to limit the jurisdiction of a United States District Court to private actions brought within 270 days (180 plus 90) from the date the complaint is filed with the Commission. The instant case was not filed with the United States District Court for the District of New Mexico until March 6, 1974, some 1,057 days after Williams made his complaint to the Commission on March 26, 1971. Hence, argues Southern Union, the trial court should have dismissed the action because of a lack of subject matter jurisdiction inasmuch as the action was not instituted within 270 days after Williams first made his complaint to the Commission.

Alternatively, Southern Union contends that the present proceeding is barred by the failure of Williams to institute the present proceeding within 90 days after receipt of the letter from the Commission that conciliation efforts had failed and that Williams had the right to bring a private action on his own behalf. In this regard Southern Union argues that this 90-day period began to run on May 30, 1973, when the Commission *first* wrote Williams of the unsuccessful effort to conciliate and his right to sue. As mentioned above, this letter of May 30, 1973, advised Williams that if he decided to sue, he should first request a "Right-to-Sue"

letter, and that he would then have 90 days *after* the receipt by him of the "Right-to-Sue" letter within which to file his action. This second letter from the Commission, *i.e.*, the "Right-to-Sue" letter, was not issued until December 6, 1973, and Williams did institute his suit within 90 days thereafter. Southern Union challenges the propriety of this "two-letter"[1] procedure and, as indicated, contends that in the instant case, the 90-day period commenced at the time Williams received the May 30 letter and that Williams did not institute the present proceedings within 90 days from May 30, 1973. Hence, says Southern Union, the trial court lacked subject matter jurisdiction for failure to comply with the 90-day requirement, as well as the 270-day requirement.

Our study of the matter convinces us that the trial court had subject matter jurisdiction and that Williams' suit was not barred by any statute of limitation. The Eighth Circuit was quite recently faced with the identical jurisdictional argument made here by Southern Union. *See* Tuft v. McDonnell Douglas Corporation, 517 F.2d 1301 (8th Cir. 1975), *cert. denied*, 44 U.S.L.W. 3394 (Jan. 12, 1976). The Eighth Circuit held in *Tuft* that the 180-day limitation contained in 42 U.S.C. § 2000-e-5(f) does not serve as a time deadline for the Commission to issue any notice to the complaining party. Furthermore, the Eighth Circuit also held that the Commission's "two-letter" procedure was not violative of the statute and that the 90-day limitation within which the complaining party had a right to sue did not commence until the complaining party actually received

---

1. We are advised that the "two-letter" procedure is no longer used by the Commission.

the formal "Right-to-Sue" letter. We agree with the interpretation given 42 U.S.C. § 2000e-5(f) by the Eighth Circuit and subscribe to the rationale of *Tuft*. For other cases bearing on this particular matter and which are generally supportive of the result here reached, *see* E.E.O.C. v. Kimberly-Clark Corp., 511 F.2d 1352 (6th Cir. 1975), *petition for cert. filed*, 44 U.S.L.W. 3097 (U.S. July 21, 1975) (No. 119); E.E.O.C. v. Louisville & Nashville R.R., 505 F.2d 610 (5th Cir. 1974), *cert. denied*, 44 U.S.L.W. 3201 (U.S. Oct. 6, 1975; and E.E.O.C. v. Cleveland Mills Co., 502 F.2d 153 (4th Cir. 1974), *cert. denied*, 420 U.S. 946 (1975). It is on this basis that we conclude that Williams' action was not brought untimely, and that the trial court was correct in holding that it had subject matter jurisdiction.

As indicated, the trial court ruled on the merits in favor of Southern Union. Its findings and conclusions are deemed by us to be at the very heart of this controversy and accordingly have been set forth in the entirety as Appendix A. For the sake of continuity, it is suggested that a reading of these findings at this point would be helpful.

42 U.S.C. § 2000e-2(a) provides that it is an unlawful employment practice for an employer to discriminate against an employee because of his religion. Under a regulation promulgated in 1966 an employer was allowed to establish a "normal work week" which would be generally applicable to all employees even though such would not operate uniformly in its effect upon the religious observances of all employees. In 1967 the following regulation which now appears at 29 C.R.F. § 1605.1 (1975) was promulgated:

> Observation of the Sabbath and other religious holidays.

> (a) Several complaints filed with the Commission have raised the question whether it is discrimination on account of religion to discharge or refuse to hire employees who regularly observe Friday evening and Saturday, or some other day of the week, as the Sabbath or who observe certain special religious holidays during the year and, as a consequence, do not work on such days.
>
> (b) The Commission believes that the duty not to discriminate on religious grounds, required by section 703(a)(1) of the Civil Rights Act of 1964, includes an obligation on the part of the employer to make reasonable accommodations to the religious needs of employees and prospective employees where such accommodations can be made without undue hardship on the conduct of the employer's business. Such undue hardship, for example, may exist where the employee's needed work cannot be performed by another employee of substantially similar qualification during the period of absence of the Sabbath observer.
>
> (c) Because of the particularly sensitive nature of discharging or refusing to hire an employee or applicant on account of his religious beliefs, the employer has the burden of proving that an undue hardship renders the required accommodations to the religious needs of the employee unreasonable.

The foregoing regulation was given legislative approval when Congress amended the definition of religion, as that term is read in the Act, to read as follows:

> The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable

to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business. 42 U.S.C. § 2000e(j).

Under the applicable statute and regulations the question before the trial court was whether Southern Union demonstrated that it was unable to reasonably accommodate to Williams' religious practice without undue hardship in the conduct of its business. The key phrases are "reasonably accommodate" and "undue hardship." In our view the issues before the trial court in the instant case were basically questions of fact, and not ones of law. In such event Williams on appeal is not entitled to a trial de novo, and the trial court's resolution of the matter cannot be overturned unless it be "clearly erroneous." Fed.R.Civ.P. 52. Cummins v. Parker Seal Co., 516 F.2d 544, (6th Cir. 1975), *petition for cert. filed,* 44 U.S.L.W. 3207 (U.S. Sept. 25, 1975) (No. 478); Williams v. Eaton, 468 F.2d 1079 (10th Cir. 1972); and Keyes v. School Dist. No. 1, Denver, Colorado, 445 F.2d 990 (10th Cir. 1971), *cert. denied,* 413 U.S. 921 (1973). The trial court's findings in the instant case are not clearly erroneous and are supported by the record. It is on this basis that we affirm.

Most of the civil rights cases concerning those who celebrate the Sabbath on Saturday involve situations where the employer attempts to compel the employee to work on Saturday as a part of his normal work week. Such is not true in the instant case. On the contrary Williams' normal work week was Sunday through Thursday. Furthermore, Southern Union did not ask Williams to perform work on a Saturday until approximately one year after his conversion. Williams' boss earlier explained that he could not promise Williams that he

would never be asked to word on Saturday, and that he might well be asked to work in an emergency situation. The very nature of Southern Union's business required that service be available to the public 24 hours a day, 7 days per week. Someone was going to have to work on Saturdays, even though all employees understandably preferred Saturday off. Indeed, Williams himself recognized that his religion did not preclude him from working on Saturdays in the event of a special emergency. However, Williams insisted that he, rather than his employer, had the exclusive right to determine just what constituted an emergency.

Getting down to the events which immediately preceded Williams' discharge, Southern Union was engaged in certain pipeline construction which it felt had to be completed by Saturday, October 3, 1970. The record is such as to permit the inference that completion of the pipeline by that date was of critical importance. And such fact we deem to be of great significance and distinguishes the instant case from other cases cited to us by counsel, *i.e.*, we are not concerned here with the employer's effort to compel Williams to work on a Saturday as a part of his normal work week; rather this is a situation where the employer was faced with an emergency situation in an isolated work area where there was no reserve of manpower who were qualified to complete the project and could be called in on a moment's notice. Williams, apparently without giving notice, advised his boss on Wednesday, September 30, 1970, that he was taking off Thursday, October 1, 1970, a regular work day, for a special religious holiday. Whether this absence in anywise contributed to the failure to complete the project by Friday, October 2, 1970, is not disclosed by the record. In any event, the

project was not completed by Friday, October 2, 1970, and it was only in this circumstance that Southern Union for the first time asked Williams to work on Saturday. When Williams refused, his boss had to delay his long scheduled vacation and he completed the job himself.

The phrases "reasonably accommodate" and "undue hardship" are relative terms and cannot be given any hard and fast meaning. In a sense the case boils down to a determination as to whether Southern Union acted reasonably under all the circumstances. On the one hand it had a duty to at least try to accommodate Williams' religious practices. On the other hand it also had a duty not only to serve the consuming public on a continuous and uninterrupted basis but also to adhere to employment practices that were fair to its other employees. In our view whether Southern Union in the instant case acted in a reasonable manner is a matter upon which reasonable minds might conceivably differ. Such fact, however, does not permit us to substitute our judgment for that of the trial court. It was the trial judge who heard the testimony and saw the various witnesses. He is the one who draws the inferences and finds the facts. In such circumstances we should not disturb his determination of the matter.

Judgment affirmed.

APPENDIX A
FINDINGS OF FACT

1. That the plaintiff Larry Williams was hired on July 20, 1962, by defendant, and that at the time of his employment the plaintiff was fully aware that defendant's operation required its employees' avail-

ability on a seven days a week, twenty-four hours a day basis.

2. That in December, 1969, plaintiff became a membe of the World Wide Church of God which believes in keeping of Sabbath day from sundown on Friday to sundown on Saturday.

3. That plaintiff notified his supervisor Al Dean of his conversion, and as a result his supervisor accommodated his religious needs by seeing that plaintiff was not scheduled to work on Saturdays in regular course thereafter.

4. The plaintiff's supervisor notified him that he would be required to work on the Sabbath only in emergency situations, but the plaintiff insisted that he would have to be the sole judge of whether or not there existed an emergency situation.

5. That during the week prior to his discharge, plaintiff requested leave on Thursday, October 1, 1973, a regularly scheduled working day, so that he could attend a religious observance in Albuquerque, and his request was accommodated.

6. In accommodating his request, however, plaintiff's supervisor cautioned the plaintiff that the project on which the plaintiff was then working and which involved a large pipeline project of critical importance to the defendant had to be completed as soon as possible due to many factors. Plaintiff's supervisor also advised plaintiff that if the job were not completed by sundown Friday, the plaintiff would be required to work on Saturday in order to see that the pipeline was put in service.

7. There were no other employees of the defendant besides the plaintiff's immediate supervisor who

were capable or familiar enough with the pipeline project to see that the pipeline was put in service as required.

8. The plaintiff's immediate supervisor had been scheduled for vacation commencing Saturday, October 3, 1970, for more than six months prior and had made arrangements to meet out-of-state residents in a remote location where they could not be reached by phone in order to begin an elk hunt.

9. When it became obvious to the plaintiff's supervisor that the pipeline project would not be finished by sundown Friday, October 2, 1970, and that the project would have to be finished Saturday, October 3, 1970, he so notified the plaintiff who refused to work on Saturday, October 3, 1970.

10. As a result of his refusal to work on Saturday, plaintiff was terminated.

11. That during the course of his employment between July of 1962 through October 2, 1970, plaintiff did apply for promotion to production technician.

12. That the plaintiff was not promoted to production technician, and the person who was promoted to that position was more qualified than the plaintiff.

13. That defendant at all material times reasonably accommodated the religious beliefs of the plaintiff.

14. That to have accommodated the plaintiff's refusal to work on Saturday, October 3, 1970, would have placed an undue hardship on the defendant and the conduct of its business, and as a result, defendant was justified in discharging plaintiff because of his refusal to work.

15. That defendant did not discriminate against the plaintiff on account of his religious beliefs.

CONCLUSIONS OF LAW

1. That at all material times hereto the defendant complied with the relevant provisions of the Civil Rights Act of 1964 as amended in that it reasonably accommodated the religious needs of the plaintiff, and that to have accommodated the plaintiff during the instance in question would have placed an undue hardship on the defendant and the conduct of its business operations.

2. That defendant did not discriminate against the plaintiff on account of his religious beliefs in violation of the Civil Rights Act of 1964 as amended.

APPENDIX C

(Filed December 10, 1974)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

No. 74-130 Civil

LARRY J. WILLIAMS,
Plaintiff,

vs.

SOUTHERN UNION GAS COMPANY,
Defendant.

COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW

The following shall constitute the Findings Of Fact and Conclusions Of Law of the Court:

FINDINGS OF FACT

1. That the plaintiff Larry Williams was hired on July 20, 1962, by defendant, and that at the time of his employment the plaintiff was fully aware that defendant's operation required its employees' availability on a seven days a week, twenty-four hours a day basis.

2. That in December, 1969, plaintiff became a member of the World Wide Church of God, which church believes in keeping of Sabbath day from sundown on Friday to sundown on Saturday.

3. That plaintiff notified his supervisor Al Dean of his conversion, and as a result his supervisor accommodated his religious needs by seeing that plaintiff was not scheduled to work on Saturdays in regular course thereafter.

4. The plaintiff's supervisor notified him that he would be required to work on the Sabbath only in emergency situations, but the plaintiff insisted that he would have to be the sole judge of whether or not there existed an emergency situation.

5. That during the week prior to his discharge, plaintiff requested leave on Thursday, October 1, 1973, a regularly scheduled working day, so that he could attend a religious observance in Albuquerque, and his request was accommodated.

6. In accommodating his request, however, plaintiff's supervisor cautioned the plaintiff that the project on which the plaintiff was then working and which involved a large pipeline project of critical importance to the defendant had to be completed as soon as possible due to many factors. Plaintiff's

supervisor also advised plaintiff that if the job were not completed by sundown Friday, the plaintiff would be required to work on Saturday in order to see that the pipeline was put in service.

7. There were no other employees of the defendant besides the plaintiff's immediate supervisor who were capable or familiar enough with the pipeline project to see that the pipeline was put in service as required.

8. The plaintiff's immediate supervisor had been scheduled for vacation commencing Saturday, October 3, 1970, for more than six months prior and had made arrangements to meet out-of-state residents in a remote location where they could not be reached by phone in order to begin an elk hunt.

9. When it became obvious to the plaintiff's supervisor that the pipeline project would not be finished by sundown Friday, October 2, 1970, and that the project would have to be finished Saturday, October 3, 1970, he so notified the plaintiff who refused to work on Saturday, October 3, 1970.

10. As a result of his refusal to work on Saturday, plaintiff was terminated.

11. That during the course of his employment between July of 1962 through October 2, 1970, plaintiff did apply for promotion to production technician.

12. That the Plaintiff was not promoted to production technician, and the person who was promoted to that position was more qualified than the plaintiff.

13. That defendant at all material times reasonably accommodated the religious beliefs of the plaintiff.

14. That to have accommodated the plaintiff's refusal to work on Saturday, October 3, 1970, would have placed an undue hardship on the defendant and the conduct of its business, and as a result, defendant was justified in discharging plaintiff because of his refusal to work.

15. That defendant did not discriminate against the plaintiff on account of his religious beliefs.

CONCLUSIONS OF LAW

1. That at all material times hereto the defendant complied with the relevant provisions of the Civil Rights Act of 1964 as amended in that it reasonably accommodated the religious needs of the plaintiff, and that to have accommodated the plaintiff during the instance in question would have placed an undue hardship on the defendant and the conduct of its business operations.

2. That defendant did not discriminate against the plaintiff on account of his religious beliefs in violation of the Civil Rights Act of 1964 as amended.

Any requested Findings Of Fact and Conclusions Of Law not included herein are hereby denied.

/s/ H. Verle Payne
United States District Judge

Supreme Court, U. S.
FILED
JUL 15 1976
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1511

LARRY J. WILLIAMS,
Petitioner,

vs.

SOUTHERN UNION GAS COMPANY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1511

LARRY J. WILLIAMS,
Petitioner,

vs.

SOUTHERN UNION GAS COMPANY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Southern Union Gas Company, the Respondent, hereby opposes the petition of Larry J. Williams that a writ of certiorari issue to review judgment of the United States Court of Appeals for the Tenth Circuit entered herein on January 21, 1976.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 529 F.2d 483 (1976). The opinion of the District Court is unreported but the Findings of Fact and Conclusions of Law of the District Court are appended to the opinion of the Court of Appeals.

JURISDICTION

Respondent contends that the Court does not have jurisdiction of this matter because the United States District Court for the District of New Mexico lacked subject matter jurisdiction of the action in the first instance for the reason that the action was filed subsequent to the expiration of the time provided for filing in 42 U.S.C. Section 2000e-5 (f) (1).

QUESTIONS PRESENTED

1. Whether the period for filing the present action had expired before filing so as to deprive the trial court of subject matter jurisdiction.

2. Whether the decision below was correct in treating the numerical quantity of Petitioner's failures to work as one of several factors rather than the sole test in determining whether Petitioner's failure to work caused undue hardship on his employer's business.

3. Whether the Tenth Circuit correctly decided that the issues before the trial court were basically factual issues, the resolution of which can only be reversed if clearly erroneous pursuant to Federal Rule of Civil Procedure 52.

STATEMENT OF CASE

Preliminary Statement

This case involves a claim of religious discrimination under the Civil Rights Act of 1964 in connection with the firing by Southern Union Gas Company ("Southern Union") of Larry Williams ("Williams"). Williams was fired because he refused to work on an emergency pipeline construction project in a remote section of northern New Mexico on Saturday, October 3, 1970, the day on which the pipeline had to be completed. Williams refused to report to work on the ground that his religion, the Worldwide Church of God, forbade working on the Sabbath, sundown Friday to sundown Saturday. Williams further took the position that only he could determine whether an emergency situation existed.

However, Williams knew from the date of his hiring in 1962 that all Southern Union employees were required to be available to work seven days a week so that continuous service could be provided to the public. It was critical to complete the pipeline in question on Saturday, October 3, 1970, and Williams knew that he might have to work on Saturday as early as Wednesday, September 30, 1970, when he asked for and received the following day off to participate in a special religious holiday of his church. The presence of Williams, or his supervisor, who had been scheduled for six months to commence his vacation on October 3, 1970, was required on October 3, 1970. It was under these circumstances that Williams refused to work and was fired.

Williams filed a complaint with the EEOC regarding the firing, and after EEOC compliance efforts failed Williams filed a private action against Southern Union. The trial court heard the case although Southern Union con-

tended that the court lacked subject matter jurisdiction because the time provided in the Civil Rights Act of 1964 for filing the action had run before the action was filed. The trial court ruled that Southern Union had complied with the relevant provisions of the Civil Rights Act of 1964 by reasonably accommodating Williams' religious needs; that for Southern Union to have accommodated Williams in the emergency instance in question would have placed an undue hardship on Southern Union in the conduct of its business operations and that Southern Union did not discriminate against Williams in his religious beliefs.

Williams appealed the decision to the United States Court of Appeals for the Tenth Circuit, but the trial court's decision was affirmed on the basis that the issues before the trial court were basically issues of fact, and the trial court's resolution of the matter could not be overturned unless it was clearly erroneous which it was not. Southern Union's cross-appeal on the basis that the District Court lacked subject matter jurisdiction was denied. Williams now seeks issuance of a writ of certiorari to the Court of Appeals for the Tenth Circuit.

Petitioner refers to *Parker Seal Co.* v. *Paul Cummins*, No. 75-478, October Term, 1975, and implies that purported similarities between *Parker* and the present case justify granting certiorari herein. However, the case at bar consists of its own unique facts which are entirely different from *Parker,* and its own legal issues which are significantly different from and fewer than *Parker.* The facts and legal issues in the present case alone must be the basis for granting or denying certiorari.

Chronology of Events

In July, 1962, Southern Union hired Larry Williams as a dehydrator repairman. At that time Williams was informed that although Southern Union employees were scheduled to work five days a week only, it was necessary for all employees to be available for work seven days a week, twenty-four hours a day. The reason for the full time availability was that Southern Union was a public utility obligated to provide continuous gas service to the public.

Until 1969, Williams belonged to no church. In 1969 he joined the Worldwide Church of God. Williams advised his superior of his conversion and its observance of the sundown Friday to sundown Saturday Sabbath, but was told he could not be guaranteed he would never be called to work on Saturday. Williams was not regularly scheduled to work on Saturday at the time of his conversion or at the time of his firing.

Up to October 3, 1970, Williams was never required to work on a Saturday. On October 2, 1970, Williams was ordered to work on Saturday, October 3, 1970, to complete a pipeline which would temporarily supply all Southern Union customers while an alternate line was improved. Completion of the pipeline on that date was of critical importance because, if delayed, the onset of winter would have required postponing the project until after winter, leaving customers with insufficient supplies for almost one year. The presence of Williams, who in 1970 was the production repairman, or his supervisor, who had for six months been scheduled to commence his vacation October 3, 1970 was required on the project. Earlier in the week, on Wednesday, September 30, Williams had requested and been given one day off to participate in a special religious holiday of the Worldwide Church of God. Williams was advised on Wednesday, September 30, that the pipeline had to be completed by Saturday, October 3, and that he might have to work on Saturday.

The pipeline was not completed on Friday, October 2, but Williams refused to report for work as required on October 3, and was fired by his superior who stayed to finish the project.

On March 26, 1971, Williams filed a complaint with the EEOC charging Southern Union with religious discrimination.

On May 30, 1973, EEOC advised Williams by letter that its compliance efforts were unsuccessful, and that he could bring a private action if he desired. The letter advised him that, if he did wish to sue, he could request a "Right-to-Sue" letter, after receipt of which he had to file his action in 90 days.

On December 6, 1973, a Right-to-Sue letter was issued by the EEOC to Williams, and on March 6, 1974, Williams filed suit in the United States District Court for the District of New Mexico.

On December 10, 1974, the District Court entered its ruling against Williams.

Williams appealed the District Court's decision on the similar grounds that Southern Union had not met its burden of showing of undue hardship by reason of Williams' failure to work, and that a one-time failure to work could not constitute as a matter of law an undue hardship on any employer. Southern Union cross-appealed on the lack of jurisdiction issue raised at trial. On January 21, 1976, the Tenth Circuit rejected Williams' appeal stating that the issues presented to the trial court were basically factual issues, and the decision of the trial court could therefore not be overturned because it was not clearly erroneous. Southern Union's cross-appeal was also denied.

On June 15, 1976, Williams filed his petition for certiorari.

REASONS FOR DENYING THE WRIT

1. The District Court Did Not Have Subject Matter Jurisdiction Of This Case In The First Instance Because It Was Filed After The Time Provided For Filing In 42 U.S.C. §2000e-5(f)(1).

42 U.S.C. §2000e-5(f)(1) provides in pertinent part as follows:

> "If within 180 days from the filing of such a charge . . . the Commission has not filed a civil action under this section . . . or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission . . . shall so notify the person aggrieved and within 90 days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved."

This statute has been interpreted to place a limit on the time for an action to be filed of 270 days from the filing of a complaint with the EEOC [*Equal Employment Opportunity Commission* v. *Louisville & Nashville Railroad Co.*, 368 F.Supp. 633, 636 (N.D.Ala. 1974); *Equal Employment Opportunity Commission* v. *Cleveland Mills Co.*, 502 F.2d 153 (4th Cir. 1974); *Genovese* v. *Shell Oil Co.*, 488 F.2d 84 (5th Cir. 1973)] and a limit on the time to file an action of 90 days after the complainant is notified of the EEOC's failure to enter a compliance agreement [*Equal Employment Opportunity Commission* v. *Cleveland Mills Co., supra; Genovese* v. *Shell Oil Co., supra; Goodman* v. *City Products*, 425 F.2d 702 (6th Cir. 1970); *Choate* v. *Caterpillar Tractor Co.*, 402 F.2d 357 (7th Cir. 1968)].

Several Circuit Court decisions have recently reached the same conclusion with respect to the 270 or the 90 day limitation period of 42 U.S.C. §2000e-5(f)(1). The Second Circuit in *Weise* v. *Syracuse Univ.*, 522 F.2d 397 (2nd Cir. 1975), held that the statute requires the EEOC to send a notice at the end of the 180 day period after the filing of the charges which notice comn ences the running of the 90 day period. The court said:

> "If the EEOC dismisses the charge, or if within 180 days of the filing the Commission has neither effected conciliation nor instituted a civil action, it is to notify the aggrieved party, who has 90 days after the giving of such notice to commence an individual civil action." 522 F.2d at 412.

See also: *De Matteis* v. *Eastman Kodak Co.*, 511 F.2d 306, modified in rehearing in other respects, 520 F.2d 409 (2nd Cir. 1975); *Cleveland* v. *Douglas Aircraft Co.*, 509 F.2d 1027 (9th Cir. 1975); *Equal Employment Opportunity Commission* v. *E. I. Du Pont de Nemours & Co.*, 516 F.2d 1297 (3rd Cir. 1975).

Under the authority of these cases, the limits for Petitioner to file his action had expired depriving the District Court of jurisdiction of the case. A period of 1,057 days elapsed from the filing of charges by Williams with the EEOC to the filing of the complaint in Federal District Court; a period of 281 days elapsed from the notification of Petitioner that EEOC conciliation efforts had failed to the filing of the complaint in Federal District Court.

42 U.S.C. §2000e-5(f)(1) has also been interpreted so as not to place such time restrictions on the filing of the action in Federal District Court. *Tuft* v. *McDonnell Douglas Corporation*, 517 F.2d 1301 (8th Cir. 1975), *cert. den.* 44 U.S.C.A. 3394 (Jan. 12, 1976), and the Tenth Circuit relied upon *Tuft* in denying Southern Union's cross-appeal based on Petitioner's failure to file within the required 270 or 90 day time limits.

The application of the *Tuft* rationale herein has resulted in sanctioning the manipulation by the EEOC and complainant of time limits which are clearly provided by statute. By using the device of an informal-formal, or two-letter notification, the EEOC can make indefinite the limit on filing an individual action. In addition to thwarting the provisions of the statute, the ruling allows the traditional problems addressed by limitations statutes to occur, absence of witnesses or reliance on dimmed memories of witnesses and a hardship on defendants to defend matters which appear to be closed by the passage of time and inaction.

Accordingly, the Court should deny the writ of certiorari on the basis that the Federal District Court did not have subject matter jurisdiction of this case in the first instance because Petitioner did not file his action within the statutorily prescribed time limits. At the very least, the Court, if it grants certiorari should also entertain the jurisdictional question presented here upon which the Circuit Courts of Appeal have issued conflicting opinions.

2. The Decision Below Was Correct In Treating The Numerical Quantity Of The Failures To Work As Only One Factor In Determining Whether There Was Undue Hardship On The Employer's Business.

Petitioner advances as his first reason for issuing the writ the unsupportable premise that a single failure to work cannot as a matter of law constitute an undue hardship for an employer. Petitioner's premise is faulty in several respects. Each case turns on its own unique facts. A one-time failure to work by an individual with certain highly

developed skills or special training at a crucial time might literally destroy a business. A one-time failure to work involving a different individual under different circumstances might result in slight or no harm to a different employer. It cannot be maintained that a one-time failure to work cannot constitute an undue hardship to any employer. The trier of fact in any case should not simply count the number of failures to work, as Petitioner would have, but must determine the impact of an employee's failure to work based on all the circumstances, including the nature of the work to be done, the importance of the work to the company, the position, skill and training of the individual, the size of the employer and other such factors as may be present. A rule of law that a one-time failure to work cannot constitute undue hardship is based upon such faulty reasoning that even if accepted, it would not long stand.

If accepted, Petitioner's premises would also result in a totally unfair rule. Petitioner asks the Court to substitute an unreasoning, automatic response for a reasoned, fact by fact analysis which is the very basis of a fair decision. Failing to take into account the innumerable factors which constitute each conflict between employee and employer can only lead to decisions which will offend the sense of fairness of all parties involved and ultimately undermine the law involved.

Petitioner's apparent reason for advancing the dubious proposition that a one-time failure to work cannot as a matter of law constitute undue hardship is to induce another court to weigh the evidence presented below and perhaps come to a different resolution of the issue than the trial court. In effect, Petitioner seeks by this petition a trial *de novo* to which he is not entitled. The evidence in a given case may show one failure to work, two failures to work or one hundred failures to work, but it is in the realm

of the trial court to weigh the evidence and determine if the failure or failures to work cause undue hardship to the employer. This determination is a factual matter which is not to be upset in the appellate courts unless clearly erroneous.

Petitioner mischaracterizes the decision below as one that will deny the American citizen's basic right to work and will work a hardship on those nearing retirement or pension. A one-time failure to work will not automatically deprive an individual of work, whether he was nearing retirement or not. The numerical quantity of the failure or failures to work, in the context of the individual's skills and position and the urgency of the work required will be considered to determine if there has been an undue hardship on the employer justifying termination. Conversely, an employer does not have to deal with the principle that an employee's first failure to work, no matter what its impact, will never justify termination of the employee.

3. The Tenth Circuit Court Of Appeals' Review Of The Issues Of "Reasonable Accommodation" And "Undue Hardship" As Factual Is Correct.

The scope of review undertaken by the Tenth Circuit was proper and correct because the issues which the District Court faced below were essentially factual in nature. In particular, the findings which Petitioner questions, that there was *reasonable accommodation* of Williams' religious beliefs and that further accommodation would have caused *undue hardship* to Southern Union are factual.

Whether an act is reasonable or unreasonable is a question encountered often by laymen in all walks of life and involves the application of knowledge obtained from nature and developed by experience to a particular situation. The

law correctly recognizes that the reasonableness of an act is a factual question in numerous areas. For example, in the law of tort the determination whether an alleged tortfeasor acted negligently or reasonably can be disturbed on appeal only if it is clearly erroneous. See e.g. *J. P. (Bum) Gibbins, Inc.* v. *Utah Home Fire Ins. Co.*, 202 F.2d 469 (10th Cir. 1953); *United States* v. *Chicago, R.I. & P. Ry. Co.*, 171 F.2d 377, 379 (10th Cir. 1948); *United States* v. *Sommers*, 351 F.2d 354 (10th Cir. 1965). In *United States* v. *One 1955 Model Ford 2-Door Coach*, 261 F.2d 125 (5th Cir. 1958), which concerned federal statutes, the issue of reasonableness was also treated as factual. *Ford* involved an attempt by a finance company to have remitted an automobile forfeited because of Federal liquor law violations, and the issue was whether an inquiry by the finance company of federal authorities regarding liquor law violations by the purchaser was timely. The applicable statute did not specify a time but had been interpreted to require inquiry in a "reasonable" time. The Fifth Circuit reversed the trial court's finding of fact that the finance company's inquiry had been made in a reasonable time. It said:

> "In that view, the period of nearly seven months elapsing between June 15, 1956, and January 10, 1957, is an unreasonably long time as a matter of law. The District Court's implied finding that it was reasonable is 'clearly erroneous.' Fed. Rules Civ. Proc. Rule 52(a), 28 U.S.C.A." 261 F.2d at 128.

The Fifth Circuit clearly considered the finding as to reasonableness a factual issue, and therefore applied the clearly erroneous rule, as did the Tenth Circuit in the present case.

The issue whether there was "undue hardship" is also a factual issue. The most persuasive authorities for this proposition are those cited by Petitioner. Petitioner states:

> "In the case of *Cummins* v. *Parker Seal* . . . the court overturned as 'clearly erroneous' the district court finding that accommodation of Cummins' beliefs would have been an 'undue hardship' on Parker Seal Company.
>
> In the case of *Draper* v. *United States Pipe & Steel Foundry Co.*, 527 F.2d 515 (1976) another divided panel of the Sixth Circuit overturned as clearly erroneous a similar finding of a district court." Williams' Petition for Certiorari at pp. 13-14.

The Tenth and Sixth Circuits are thus in agreement, by Petitioner's own admission and authority, that the issue of "undue hardship" is a factual one. The same treatment of the issue is found in other areas of the law. *Shapiro* v. *Rubens*, 166 F.2d 659, 665-66 (7th Cir. 1948) (finding against undue influence by son in execution of father's will affirmed as not clearly erroneous).

Petitioner's argument that these issues are legal is based solely on the fact that the District Court, "by adding citations of law, transformed its last three 'findings of fact' into 'conclusions of law.'" Williams' Petition for Certiorari at p. 13. The reason for Petitioner's confusion is that Section 701(j) of the Civil Rights Act of 1964, as amended, contains the terms "reasonably accommodate" and "undue hardship". Thus, the statement of whether the law has been violated or complied with necessarily will include a reference to these trems. But such reference does not transform the findings of fact into conclusions of law or vice versa. Each remains subject to a separate and distinct determination and process.

Petitioner's reliance on *Baumgartner* v. *United States*, 322 U.S. 665 (1944), to support its contention that the Tenth Circuit applied the wrong standard in reviewing the

case at bar is totally misplaced. The issue in *Baumgartner*, which involved setting aside a certificate of naturalization of an alleged Nazi sympathizer, was whether the United States Supreme Court was bound by the concurrent findings of two lower courts. The Court in *Baumgartner* found that on appeal it could review facts found by both the trial and appellate courts on authority of *Beyer* v. *LeFevre*, 186 U.S. 114 (1902) which held:

> "Passing to the second question, we premise by saying that it is well established that when the trial and the appellate courts agree as to the facts established on the trial, this court will accept their conclusion, and not attempt to weigh conflicting testimony (cite omitted) . . . At the same time there has always been recognized the right and duty to examine the record, and if it finds that the conclusions are *wholly unwarranted* by the testimony it will set the verdict or report aside and direct a re-examination." 186 U.S. at 119. (Emphasis added).

See also: Moore's Federal Practice, *Effect in Supreme Court of Concurrent Findings of Fact of Two Lower Courts —The Two Court Rule*, §52.12 at 2762 et seq.

Baumgartner is clearly not applicable and does not even purport to give direction to the Circuit Courts of Appeal on the application of Federal Rule of Civil Procedure 52. However, to the limited degree that the *Baumgartner* holding may be extended to the present case, *Baumgartner* supports the Tenth Circuit's decision that an appellate court may not reject the factual findings of a trial court unless the factual findings are wholly unwarranted, or in the words of Federal Rule of Civil Procedure 52 "clearly erroneous".

Petitioner is likewise incorrect in his contention that the courts below are divided regarding whether the issues of "reasonable accommodation" and "undue hardship" are factual or legal. The very cases cited by Petitioner belie his statement and show consistent treatment of the issues as factual. The Sixth Circuit in *Cummins, supra,* treated as factual and reversed as clearly erroneous this finding:

> "This Court finds from the entire record herein that the defendant made a reasonable accommodation to the plaintiffs' religious needs and that no further accommodation could be made at the time of the defendant's dismissal from employment without creating an undue hardship on the employer's business." 516 F.2d at 546.

In *Draper* v. *United States Pipe & Foundry Co.*, 527 F.2d 515, 519 (1976), the Court treated as factual and reversed as clearly erroneous the finding that:

> "Rather, the evidence preponderates in favor of a finding that the defendant attempted to reasonably accommodate the plaintiff in his religious convictions, but when such accommodations were found by the plaintiff to be unacceptable, the defendant was unable to further accommodate the plaintiff without modifying its operations in an economically disadvantageous manner and without undue hardship in the conduct of its business." 527 F.2d at 529.

Petitioner is able to claim that the Eighth Circuit in *Hardison* v. *Transworld Airlines, Inc.*, 527 F.2d 33 (8th Cir. 1975) did not treat the issues as factual only by misstating the case. Petitioner contends that the Eighth Circuit never discussed the issue it raised—"whether the finding below that defendants had fulfilled their duties to attempt reasonable accommodation of Hardison's religious practices, short

of undue hardship, were clearly erroneous." 527 F.2d at 37. It is clear that the Eighth Circuit applied the "clearly erroneous" doctrine. In discussing evidence relating to TWA hardship, the Court said "We think the District Court erroneously drew the inference of undue hardship from such testimony." 527 F.2d at 40. The Court also said in the sentence immediately preceding the quotation cited in petitioner's brief,

> "It does not appear from the record, however, that TWA gave any serious consideration to the reasonableness of such an alternative or to the extent of the burden it might create upon the business of TWA." 527 F.2d at 41.

These statements, taken together with the court's own framing of the issue, indicate that the Eighth Circuit did follow the clearly erroneous doctrine in *Hardison* and necessarily recognized the issues as factual.

Petitioner wrongly claims that the following cases identify the reasonable accommodation and undue hardship issues as "legal": *Dixon* v. *Omaha Public Power District*, 385 F.Supp. 1382 (D.Neb. 1974), *Johnson* v. *U. S. Postal Service*, 364 F.Supp. 37 (N.D.Fla. 1973) and *Jordan* v. *N. Carolina National Bank*, 399 F.Supp. 172 (W.D. N.C. 1975). These cases do not purport to discuss whether the issues of reasonable accommodation and undue hardship are matters of fact or law. The cases do include conclusions of law on these issues. But, as stated above, an inclusion of statements regarding reasonable accommodation and undue hardship will likely appear in any trial court's conclusions of law because these terms appear in the Civil Rights Act of 1964. However, this does not exclude a separate finding of fact on these issues, and in these cases are statements indicating that the court did enter such factual findings. In *Dixon*, Finding of Fact No. 6 states, in part:

> ". . . the defendant had accommodated the plaintiff on one or two occasions when he had declined to work beyond his regularly scheduled hours on a Friday evening, *but this had presented no undue hardship to the defendant . . .*" 385 F.Supp. at 1384. (Emphasis added).

The *Johnson* decision also indicates that the determination of reasonable accommodation is factual although the discussion occurs under the court's conclusion of law. The court says,

> "The simple fact which places this factual situation squarely within the exception, which is not contested, is that the Chattahoochee Post Office operates on a limited scale with a minimal number of employees and facilities. The requisite manpower does not exist to accommodate plaintiff." 364 F.Supp. at 42.

In *Jordan* also, the court made the following findings with respect to a co-worker of plaintiff:

> "Ms. Woods' position is that she absolutely cannot work on Saturday; *the defendant has successfully accommodated her religious needs without a hardship on the bank.*" 399 F.Supp at 177. (Emphasis added).

A close examination of the cases cited to the Court by Petitioner and the case at bar reveals that there is a remarkably consistent recognition and treatment of the issues of "reasonable accommodation" and "undue hardship" as factual. The appearance of these terms in conclusions of law results from their inclusion in the language of the Civil Rights Act of 1964 and does not make obligatory a determination that the issues are legal or mixed legal and factual. Hence, the Tenth Circuit's decision that the issues are factual is in line with other decisions and there is no inconsistency to be resolved by the Court.

Petitioner cites the Tenth Circuit case, *Stafos* v. *Jarvis*, 477 F.2d 369 (10th Cir. 1973), for the general proposition that the "clearly erroneous" rule does not apply on questions of law or mixed questions of law and fact. However the dictum quoted from *Stafos* is of no probative value here because *Stafos* is a bankruptcy case in which the issue was whether the Kansas constitutional provision for homesteads allowed the bankrupt to exempt certain acreage as farming land. Other cases cited by Petitioner for the same general proposition are inapposite because they do not pertain to solely factual issues.

4. The Case Is Limited To Its Facts And Will Have No Broad Application.

This case will be limited to its facts because it involves the failure to work in an emergency situation for religious reasons. Most religions, including the Jewish and Christian religions hold in this regard that believers may respond to emergency situations on the Sabbath without violating religious rules. Since these religions predominate in the United States, the question in this case will not arise for a great number of citizens. It is unlikely that the issue will present itself even to members of the Worldwide Church of God because that sect also recognizes that work can be performed on the Sabbath in emergency situations. Only those persons who feel, as Petitioner did, that he alone makes the determination whether an emergency exists in his employer's business will be affected by this decision. Respondent submits that the number of individuals who fall into the same category as Petitioner is so small as not to justify granting certiorari on the laws that this case presents a problem of substantial import to the nation.

CONCLUSION

For the foregoing reasons, Respondent respectfully prays that the Court deny issuance of a writ of certiorari to review the judgment of the Court of Appeals below, and that the Court not take any action in this case based on the *Baumgartner* case which is totally inapplicable here. In the event that the Court does issue a writ of certiorari herein, Respondent respectfully prays that the Court entertain the question whether the District Court had subject matter jurisdiction of this case in the first instance.

Respectfully submitted,

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